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No. 97 1284

In The

Supreme Court of the United States

October Term, 1997

FAYETTE COUNTY BOARD OF EDUCATION,

Petitioner,

v.

L.G.P., Sr., T.P., L.G.P., Jr.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Student Respondent was properly adjudged to be a resident of the Petitioner, a Kentucky public common school district, under the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, along with applicable state law and regulations when the student Respondent was never present in Kentucky, was over the age of eighteen (18) at the time his parents moved to Kentucky in June 1994, and had not been adjudicated disabled for purposes of competency nor had any Kentucky guardian been appointed during the time his residency was in dispute.

PARTIES TO THE PROCEEDING

The Petitioner is the Fayette County Board of Education. The Respondents are L.G.P., Sr., T.P., and L.G.P., Jr.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Fayette County Board of Education, respectfully petitions as follows for a Writ of Certiorari to review the November 6, 1997, Opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit in Appeal No. 96-6373, filed November 6, 1997, is unreported. (App. 1 - App. 2.)

The Opinion and Order of the United States District Court for the Eastern District of Kentucky, Civil Action No. 95-381, was entered on September 9, 1996, and is unreported. (App. 3 - App. 19.)

The July 31, 1995, Decision and Order of the Exceptional Children Appeals Board, Department of Education, Commonwealth of Kentucky (App. 20 - App. 23), and the June 7, 1995, Hearing Officer Decision (App. 24 - App. 41), are unreported administrative decisions.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion and Judgment on November 6, 1997. This petition for a writ of certiorari was filed within

ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

20 U.S.C.A. § 1412(2)(B), (C) (West 1990) (App. 42-43).

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20 U.S.C.A. § 1413(a)(1) (West September 1997 Supp.) (App. 46).

STATE STATUTES INVOLVED

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KRS 387.510(8) (App. 49-50)

KRS 387.570 (App. 50-51)

KRS 2.015 (App. 51)

STATE REGULATION INVOLVED

707 KAR 1:180 Section 1(2)(a) (App. 52)

STATEMENT OF THE CASE

The action below was filed in the United States District Court for the Eastern District of Kentucky by Petitioner, Fayette County Board of Education (the "Board"), for purposes of appealing from that certain Decision and Order of the Exceptional Children Appeals Board, Department of Education, Commonwealth of Kentucky (hereinafter "Appeals Board"), dated July 31, 1995. (App. 20.) The action arose under the Individuals With Disabilities Education Act, 20 U.S.C.A. § 1400 *et seq.* (West 1990 and Supp. 1997) *amended by* the Individuals With Disabilities Education Act Amendments of 1997, Pub.L. No. 105-17, 111 Stat. 37 (codified at 20 U.S.C.A. § 1400 *et seq.* (West September 1997 Supp.)) ("IDEA"). The United States District Court for the Eastern District of Kentucky had subject matter jurisdiction of the action under 20 U.S.C.A. § 1415(e)(4) (West 1990) as well as 20 U.S.C.A. § 1415(e)(1) and (2) (West 1990), which provisions granted the district courts of the United States subject matter jurisdiction over actions arising under the IDEA without regard to the amount in controversy or diversity. Because the action arose under the laws of the United States, subject matter jurisdiction was also conferred on the United States District Court for the Eastern District of Kentucky by 28 U.S.C. § 1331. Named as Defendants below were Respondents, L.G.P., Jr. (hereinafter sometimes referred to as "Student"), and his parents, L.G.P.,

Sr., and T.P., all of whom were parties to the administrative proceedings which preceded the district court action. The Board requested entry of a judgment reversing the Appeals Board Opinion and Order and sought a declaration that the Student was not a resident of the Fayette County Public School District at times pertinent to the administrative proceeding below so as to give rise to any obligation on the part of the Board to provide or to fund educational services under the IDEA and corresponding state law.

The Student was born on November 25, 1974. At all times pertinent herein, the Student has been physically present in a residential setting at the Au Clair Palms Facility, Mt. Dora, Florida. Respondents admitted below that at the time of the parents' move to Lexington, Kentucky, in June 1994, "the Student was physically present and residing in Florida" and the "Student has continuously been physically present in Florida since his placement there at the behest of the Parents and the Bristol Connecticut Public School District on or about April of 1988." (TR. 4, Answer, ¶ 1.) As of the time of the filing of the complaint below on August 30, 1995, the Student's parents had not been appointed as guardians of the Student nor had the Student been adjudicated as incompetent or legally disabled by any court of competent jurisdiction. (TR. 1, Complaint, ¶ 13; TR. 4, Answer, ¶ 1.) The Respondent subsequently made of record a copy of a Fayette County District Court Order dated October 24, 1995, appointing the parents as limited guardians, as well as a judgment of legal disability pursuant to KRS Chapter 387 bearing the same date.

Pursuant to certain Admissions and Release Committee ("ARC") meetings held among the parents and Board officials,[1] the Board made three payments to the Au Clair Palms Facility in Florida for services for the months of September, October, and November 1994. (TR. 19, Opinion and Order at p. 2.) However, the Board did not enter into any contract for placement of the Student at such facility. (TR. 1, Complaint ¶ 14.)

By letter dated December 8, 1994, the Board, through its general counsel, advised the parents educational services would no longer be provided to L.G.P., Jr., on the basis that the parents possessed no guardianship of L.G.P., Jr., thus placing his residency and eligibility for school purposes at issue. The parents challenged this action via a due process hearing request filed under the IDEA and corresponding state law and regulations. (TR. 19, Opinion and Order at p. 2.) By Decision rendered June 7, 1995, Honorable Patricia Walker Fitzgerald, Hearing Officer, determined "[t]he Student is a resident of Kentucky and has been since his Parents moved to this State in June 1994." (App. 24.) However, the Hearing Officer further opined in the course of her analysis that residency is a "jurisdictional prerequisite to the duty of a district to provide services to a child." (TR. 1, Complaint, ¶ 18; TR. 4, Answer ¶ 1.) The Board timely appealed this Decision

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[1] Under Kentucky Board of Education regulations promulgated pursuant to the IDEA, an Admissions and Release Committee generally consisting of the parents, a regular education teacher, special education teacher, the principal of the school, and appropriate administrative personnel, is charged with formulating and overseeing educational programs of students with disabilities. *See, e.g.*, 707 KAR 1:180 Section 4.

to the Appeals Board, the final administrative body empowered in Kentucky to hear controversies arising under the IDEA. By Opinion and Order dated July 31, 1995, the Appeals Board affirmed the Decision.

The Board filed its Complaint in the United States District Court on August 30, 1995. (TR. 1.) The Respondents, Defendants below, filed their Answer and Counterclaim on November 6, 1995. The Counterclaim sought relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Americans With Disabilities Act, 42 U.S.C. § 12132, 42 U.S.C. § 1983 and additionally claimed procedural violations under the IDEA. (TR. 4.) After the Board filed its reply (TR. 5), the Respondents moved the district court to enter a preliminary injunction "requiring the Plaintiffs to honor 20 U.S.C. § 1415(e)(2), commonly known as the 'stay put' provision of the Individuals With Disabilities Education Act. . . . " (TR. 6.) The Board responded (TR. 8) and after a hearing on December 29, 1995, the district court passed as moot the demand for "stay put" relief. (TR. 11.) The district court's order on the motion for preliminary injunction further required the Board to make payment to the Florida facility where the Student was residing for November and December 1995. Inasmuch as the parents [redacted] obtained state district court determinations of disability for competency purposes and guardianship pursuant to KRS Chapter 387 in late October 1995, the Board no longer contested the Student's residency. The order of appointment of guardianship and judgment of disability were made of record as attachments to the memorandum in support of injunctive relief filed by the Respondents. (TR. 6.) The December 29, 1995, Order of the district court further determined that the

educational placement of the Student would expire at the conclusion of the 1995-96 school year (June 30, 1996) unless continued by the Admissions and Release Committee.

After submission of cross-memoranda by the parties (TR. 12-17) the district court entered its Opinion and Order (App. 3) and Judgment dismissing the Respondents' counterclaim and determining that even prior to the October 1995 judgments of guardianship and disability the Student was a resident of Kentucky entitled the educational services under the IDEA (effectively affirming the decision of the appeals Board). The district court's Judgment addresses the period from when the Board placed the Student's residency in issue from December 1994 to November 1995.

By *per curiam* Opinion rendered on November 6, 1997, the United States Court of Appeals for the Sixth Circuit affirmed the district court on the residency issue "upon the reasoning employed by that court in its September 9, 1996, Opinion and Order."

REASONS FOR GRANTING THE WRIT

The IDEA does not define residency. *See Wise v. Ohio Dept. of Educ.*, 80 F.3d 177, 182 (6th Cir. 1996). Clearly, under the pertinent IDEA provisions addressed in the record below, as well as the subsequent amendments enacted in 1997, Congress has expressed its intent that states and local educational agencies desiring to receive funding under the IDEA have to provide appropriate

educational services to *residents* of the state or local educational agency. Thus, 20 U.S.C. § 1412(2)(B), prior to its amendment in 1997, directed states to develop plans for providing "a free appropriate public education . . . for all children with disabilities between the ages of 3 and 21 within the state. . . . " This provision is echoed in the 1997 amendments which provide, in pertinent part, that to receive financial assistance under IDEA a state must demonstrate that its policies and procedures afford "[a] free appropriate public education . . . to all children with disabilities residing in the State between the ages of 3 and 21. . . . " 20 U.S.C.A. § 1412(a)(1)(A) (West September 1997 Supp.)

Under 20 U.S.C.A. § 1412(2)(c) (West 1990) (amended 1997), "all children residing in the state who are disabled" were to be identified, located, and evaluated in order for a state to be eligible for financial assistance. This state obligation is addressed in the new IDEA provisions at 20 U.S.C.A. § 1412(a)(3)(A) (West September 1997 Supp.), which requires that state policies and procedures provide for the identification, location, and evaluation of "[a]ll children with disabilities residing in the State. . . . "

Similarly, the courts below considered 20 U.S.C.A. § 1414(a)(1)(A) (West 1990) (amended 1997) requiring local educational agencies to annually submit a state application providing that "all children residing within the jurisdiction of the local educational agency . . . in need of special education and related services will be identified, located, and evaluated. . . . " While the amendments no longer require a local educational agency to submit annual applications, the local educational agency must have in effect policies, procedures, and programs

"providing for the education of children with disabilities within its jurisdiction" which are consistent with state policies and procedures. 20 U.S.C.A. § 1413(a)(1) (West September 1997 Supp).

Thus, under the IDEA, as amended, the residency of eligible youths serves as a mandatory prerequisite to the state or local educational agency's obligation to provide services.

In the present case, the Respondent, L.G.P., Jr., was nineteen (19) years old at the time his parents moved to Fayette County, Kentucky, in June 1994. L.G.P., Jr., was never physically present in Kentucky. Prior to the guardianship proceeding in late October 1995, the parents did not hold guardianship of L.G.P., Jr., nor had he been legally adjudicated as incompetent from his disability.

In failing to define residency, the IDEA requires reference to state law on this issue and residency serves as a limitation on the scope of a given school district's duty under the Act. *See, e.g., Susan R.M. v. Northeast Independent School District*, 818 F.2d 455 (5th Cir. 1987). Applicable Kentucky statutory provisions establish residency as a prerequisite to the provision of educational services. *See, e.g.*, KRS 158.030(1) (App. 47) and KRS 158.100 (App. 47-48). For many years, Kentucky's appellate courts have construed the term "reside" for educational purposes as meaning actual residence rather than legal domicile. *See, e.g., Turner v. City Board of Education*, 313 Ky. 383, 231 S.W.2d 27 (1950) (residency means not domicile but the place where the child is an inhabitant or lives in fact); *Crain v. Walker*, 222 Ky. 828, 2 S.W.2d 654 (1928). The Kentucky statutory provision defining "exceptional

children and youth" speaks of "persons under twenty-one (21) years of age" needing special educational programs or services for them to benefit from the educational programs of the public schools in the districts "in which they reside." KRS 157.200(1) (App. 48).

As relates to guardianship and disability, KRS 2.015 (App. 51) statutorily establishes the status of being an adult, of the age of majority, at eighteen (18) years of age in Kentucky. The exceptions to this legislated status include "for purposes of care and treatment of children with disabilities for which twenty-one (21) years of age is the majority." KSR 2.015 must be considered in tandem with provisions of KRS Chapter 387 addressing the rights of those who might be adjudicated legally disabled for purposes of competency. KRS 387.510(8) (App. 49-50) defines "disabled" to mean a legal, not a medical disability. KRS 387.500 (App. 48-49) sets forth a policy against determinations of total incompetency in the event persons are found to be only partially disabled. KRS 387.570 (App. 50-51) requires a jury determination of disability and KRS 387.520 provides that Kentucky state district courts (Kentucky's courts of inferior jurisdiction) have exclusive jurisdiction "over all proceedings involving a determination of partial disability or disability. . . . "

The regulatory provision which brings the foregoing state statutory framework into focus is set forth at 707 KAR 1:180 Section 1(2)(a) (App. 52). This provision is included among the Kentucky State Board of Education regulations implementing the IDEA and defines the term "emancipated youth" as follows:

> "(a) A youth who has reached the age of majority, eighteen (18), and no evidence exists that

> there is a court order or legal document showing the parent as the guardian or youth's representative in educational matters. . . . "

Because there was no order of guardianship and disability prior to October 1995 and because L.G.P., Jr., was considered emancipated under the state regulatory definition specifically addressing his status under the IDEA, his parents' mere presence in Kentucky did not serve to establish his residency. *Cf. Susan R.M. v. Northeast Independent School District,* 818 F.2d 455, 459 (5th Cir. 1987).

Citing to *Wise v. Ohio Dept. of Educ.,* 80 F.3d 177, 182 (6th Cir. 1996), the district court in the present matter determined that the Sixth Circuit had previously concluded that under the IDEA, "the responsible LEA is the one in which the parents reside." In addition, the district court concluded that the exception to KRS 2.015 (Kentucky's Age of majority statute) (App. 51) relating to care and treatment of children with disabilities was self-effectuating notwithstanding the "emancipated youth" regulation and provisions of Chapter 387 discussed above.

Wise v. Ohio Dept. of Educ., 80 F.3d 177, 182 (6th Cir. 1996), involved two children whose parents resided outside of Ohio and who unilaterally placed their children in Ohio residential facilities without involving their home school districts in that decision. They challenged an Ohio statute under which Ohio was authorized to collect tuition from in-state residential facilities which provided educational services to minor children placed by non-resident parents. The Sixth Circuit held that the tuition requirement was enforceable and did not conflict with the IDEA. *Wise,* 80 F.3d at 185. The *Wise* court noted that, under the IDEA, children who are placed by a local

educational agency in an out-of-state facility can nevertheless be considered "within the state . . . ," *see* 20 U.S.C.A. § 1412(2)(B) (West 1990), when the school district of the parents' residence places the child in such out-of-state facility. "But the parents' LEA bears such financial responsibility only when the child is in the out-of-state school because the parents' LEA developed an IEP that placed her there." *Wise*, 80 F.3d at 183. In the present matter, the local educational agency which developed the IEP placing L.G.P., Jr., in the Florida residential setting was the Bristol Connecticut School District and even after the student turned eighteen (18) years of age, that school district continued to fund the placement. The lower courts' extension of *Wise*, to the effect that the IDEA mandates that residency of an eighteen (18) to twenty-one (21) year old youth must follow that of his or her parents should be corrected by this Court.

The judgment below also cannot be squared with *Susan R.M. v. Northeast Independent School District*, 818 F.2d 455, 459 (5th Cir. 1987). In *Susan R.M.*, a father brought a *pro se* action seeking to compel a Texas School district to provide residential placement and educational services to his daughter. A Texas county welfare department had been appointed as the daughter's managing conservator. Applying Fed.R.Civ.P. 17(c), the district court held that the father lacked standing to pursue the action. In the course of its analysis the court stated that when the student reached majority on her eighteenth birthday her district of residence for educational purposes will be where she chooses to live unless a state court finds her incompetent and appoints a guardian. "If a guardian is appointed, then the guardian will determine

her place of residence." *Susan R.M.*, 818 F.2d at 459. This plainly conflicts with the result reached below, *i.e.*, that the IDEA mandates that a local school district must provide special education services to an "emancipated youth" living out of the state and whose in-state parents possess no guardianship.

The Sixth Circuit's interpretation of the IDEA to require local school district officials to simply presume that Respondent, L.G.P., Jr., was *legally* disabled in the absence of Congressional intent purporting to pre-empt state law on this issue compels review and correction by this Court. *Cf. Goff v. Walker*, Ky., 809 S.W.2d 698, 699 (1991) (Ky.R.Civ. P. 17.03 did not require trial court to appoint guardian *ad litem* to defend party declared by physicians to be unable to participate in court proceeding because "[t]he potential for abuse in declaring someone incompetent short of the statutory requirements is obvious"). In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 190 n. 11, 204 n. 26 (1982), this court indicated that the predecessor to the IDEA was enacted pursuant to the spending power of Congress. *See* U.S. Const. art. I, § 8. Plainly, the recent amendments maintain this characteristic. *See, e.g.*, 20 U.S.C.A. §§ 1411-1413 (West September 1997 Supp). Under *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), in order for conditions on the receipt of money to be enforceable under legislation enacted pursuant to the spending power, such conditions must be clear and unambiguous. *See, also, Commonwealth of Virginia Dep't of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997) (*en banc*). The interpretation of the IDEA so as to require the

provision of educational services to a young adult student who has never been present in the state and whose in-state parents possess no state law right to represent him gives rise to a federal residency rule which Congress cannot be presumed to have intended under these authorities.[2]

The decisions of this Court have not addressed the issue of residency under the IDEA. This is an issue of national import which is worthy of the attention of this court. In *Martinez v. Bynum,* 461 U.S. 321 (1983), this Court upheld against an equal protection challenge a statute that permitted a school district to deny free admission to a minor who lived apart from his parents where his presence in the district was for the primary purpose of attending free public schools. In so holding, this Court recognized the provision of primary and secondary education as one of the most important functions of local government. Further, "[a]bsent residence requirements, there could be little doubt that the proper planning and operation of the schools would suffer significantly." "The state thus has a substantial interest in imposing bona fide residence requirements to maintain the quality of local public school." *Martinez,* 461 U.S. at

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[2] While L.G.P., Jr.'s residency rather than age served to bar entitlement to services, it is worth pointing out that Congress expressly defers to local law regarding the age range of children who are age 18 or over to be served. *See* 20 U.S.C.A. § 1412(2)(B) (West 1990); 20 U.S.C.A. § 1412(a)(1)(B) (West September 1997 Supp). Coupled with express language requiring provision of services to residents, this is strong indicia that state law residency requirements were not intended to be overridden by the IDEA.

329-30. Local school districts have a vital interest in preserving their resources for children who are residents. Further, as exemplified by the Kentucky emancipated youth regulation, local school districts likewise have a strong interest in dealing with parties who are legally entitled to represent a youth or adult while avoiding having to make legal determinations of disability and guardianship, which determinations are properly vested exclusively in a state court.

The application of the "residency follows the parents" rule to a student who is over the age of eighteen (18), who was never physically present in the state and for whom no guardian had been appointed gives rise to a federal rule of residency which was not intended by Congress and which conflicts with the above principles enunciated by this Court in *Martinez*. The issue presented is one of first impression and demands review and correction.

CONCLUSION

For the reasons stated above this Court is respectfully requested to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 96-6373

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FAYETTE COUNTY BOARD OF EDUCATION, **Plaintiff-Appellant,**	)	**ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY
v.	)	
L.G.P., Sr., T.P., L.G.P., Jr., **Defendants-Appellees.**	)	**MEMORANDUM OPINION** (Filed Nov. 6, 1997)

BEFORE: KENNEDY, NELSON, and CLAY, Circuit Judges.

PER CURIAM. Plaintiff, Fayette County Board of Education ("the Board"), appeals the district court's final judgment, entering judgment in favor of the defendants on the issue of residency. The district court based its judgment on its Opinion and Order, granting in part and denying in part the Board's Motion for Summary Judgment.

On appeal, the Board contends that, under the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1401 et seq., it should not be financially responsible for the education of a severely mentally disabled young adult, between the ages of eighteen and twenty-one, that does not live – and has never lived – in the state of Kentucky but whose parents reside there.

Having had the benefit of oral argument, and having carefully considered the record on appeal, the briefs of the parties, the arguments of counsel, and the applicable law, we are not persuaded that the district court erred in finding that L.G.P., Jr., was a resident of Fayette County, Kentucky, under the IDEA, and that the Board was obligated to provide or fund his educational services.

Because the reasoning which supports the district court's denial of the Board's summary judgment motion has been articulated by the district court, the issuance of a detailed written opinion by this Court would be duplicative and would serve no useful purpose.

Accordingly, we **AFFIRM** the district court's final judgment upon the reasoning employed by that court in its September 9, 1996, Opinion and Order.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 95-381

BOARD OF EDUCATION OF FAYETTE COUNTY, KENTUCKY, PLAINTIFF

V.

OPINION AND ORDER

(Filed Sept. 9, 1996)

L.G.P., Sr., T.P., and L.G.P., Jr., DEFENDANTS

* * *

This action arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* By order dated December 29, 1995, the parties were directed to file briefs on the merits after which this matter would stand submitted. The parties having briefed the issues, this matter is now ripe for decision.

I. BACKGROUND

L.G.P., Jr. ("Jr."), the student in this matter, was born on November 25, 1974. He has been diagnosed with Down's Syndrome, and has a greater degree of mental retardation than usually found in a Down's Syndrome child. Jr. has exhibited negativistic and destructive behavior, and functions on the level of a pre-school child.

While a resident of Bristol Connecticut, where he lived with his parents, Jr. was evaluated by the Bristol Public Schools, and it was determined that he should be

placed in a residential setting. Jr. was thereafter placed with Au Clair Palms, Au Clair, Florida, sometime between 1986 and 1988. It is undisputed that at all times pertinent to this action, Jr. was physically present in Florida, and has never been present in Kentucky.

In June 1994, when Jr. was over 19 years old, his parents moved to Fayette County. Prior to the move, they contacted the Local Educational Agency ("LEA"), the Fayette County Board of Education ("the Board"), plaintiff herein, to discuss Jr.'s placement. At least three Admission and Release Committee ("ARC") meetings were held to discuss this matter. The ARC determined that Jr. should remain at Au Clair, with Fayette County paying the tuition, until an appropriate Individual Education Plan ("IEP") could be developed. Subsequently, three payments, for the months of September, October, and November 1994, were made by the Board toward Jr.'s tuition.

At the ARC meeting held on December 1, 1994, the Board claims to have learned for the first time that Jr.'s parents were not his legal guardians. Thereafter, by letter dated December 8, 1994, the Board informed Jr.'s parents that because they were not Jr.'s legal guardians, the ARC process and services would be terminated, and the Board would seek reimbursement for the expenses already incurred in serving Jr.

Afterwards, the parents sought a due process hearing. On June 7, 1995, the Hearing Officer tendered her decision finding that Jr. was a resident of Kentucky and that the Board's termination of services was in violation of state and federal law. The Board timely appealed that

decision to the Exceptional Children's Appeal Board, which affirmed the decision of the Hearing Officer. The Board thereafter sought review in this Court, claiming that Jr. was not a resident of Kentucky, that the Hearing Officer and Appeals Board lacked subject matter jurisdiction to consider the issue of residency, and that the decision on the issue of residency was erroneous.

Thereafter, in October of 1995, Jr. was adjudicated disabled and his parents were appointed as his legal guardians.

II. STANDARD OF REVIEW UNDER THE IDEA

The Board is authorized to bring this action by 20 U.S.C. § 1415(e)(2), which provides that "any party aggrieved by the findings and decision made . . . " by the state educational agency "shall have the right to bring a civil action with respect to the complaint presented pursuant to this section. . . . " The statute further provides that "[i]n any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

In *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455, 458 (6th Cir. 1993), the Sixth Circuit Court of Appeals addressed the appropriate standard of review under the IDEA:

> The standard of review for actions brought under the Act is a modified *de novo* review. In

Board of Educ. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982), the Supreme Court indicated that a complete *de novo* review is inappropriate. Quoting *Rowley*, this Court has held that the language in the Act "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. . . . " *Thomas*, 918 F.2d at 624. This Court has determined that Rowley "requires a de novo review [of the due process hearing] but that the district court should give due weight to the state administrative proceedings in reaching its decision." *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir.), cert. denied, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983).

III. THE IDEA

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"), provides states with federal funds to help defray the costs of educating children with disabilities. 20 U.S.C. § 1411. The term "children with disabilities" means children "(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, need special education and related services." 20 U.S.C. § 1401(a)(1)(A).

To receive federal funds under the IDEA, states must abide by a host of regulations governing the provision of educational services. Under the IDEA, states are required

to identify, locate, and evaluate "all children residing in the State who are disabled . . . and who are in need of special education and related services. . . . " 20 U.S.C. § 1412(2)(C). States must provide "a free appropriate public education . . . for all children with disabilities between the ages of three and twenty-one within the State . . . except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice . . . respecting public education within such age groups in the State." 20 U.S.C. § 1412(2)(B).

Under the IDEA, a "free appropriate public education" is defined as special education and related services that –

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18). The IDEA requires local educational agencies to develop individual educational placements (IEPs) for children under which children receive free appropriate special education and related services.

As stated, the IDEA requires states to provide free public education to children within the state. "Congress defined the scope of 'within the state' to place financial responsibility for children's special education on the local education agency ("LEA") in which the parents reside." *Wise v. Ohio Dept. of Educ.*, 80 F.3d 177, 182 (6th Cir. 1996).

> IDEA contemplates that parents send their children to the LEA in which the parents reside. Although IDEA does not define residency, *see* 20 U.S.C. § 1401 (definitions section), other language in IDEA places ultimate financial and supervisory responsibility for a child's special education and related services with the particular LEA in which the parents reside. Congress requires states receiving federal funds under IDEA to provide free special education services to all children "within the state. . . . " Congress defined the scope of "within" as follows:
>
> > The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency. . . .
>
> 20 U.S.C. § 1412(6). Congress defined "within" as including children whose parents reside in the state but who receive services in or from another state. Thus, states' obligation under IDEA to provide a free public education to all children with disabilities "within the state"

> includes those children who are receiving services in another state but whose parents reside in the state. A child might be placed in another state because, during the course of developing an IEP for the child, the parent's LEA determines that no in-state facility or school could provide appropriate special education and related services. See 20 U.S.C. § 1401(a)(18). The LEA that places the child in another state or in a private facility must exercise supervisory authority over the service provider to ensure the child is receiving an appropriate education. See 20 U.S.C. § 1412(6). The parents' LEA also retains financial responsibility for the cost of the services provided by the other state or facility. . . .

Id. at 182-83.

IV. THE PARTIES' BRIEFS

A. The Board's Argument

The issue raised by the Board in this case is whether Jr. was a resident of Fayette County, thereby obligating the Board to provide educational services under the IDEA, prior to the time his parents became his legal guardians in October of 1995.

Essentially, the plaintiff Board argues that because Jr. was over the age of eighteen when his parents moved to Fayette County, and his parents had not at that time been appointed as his legal guardians, nor had he been adjudicated incompetent, Jr.'s residence must be determined independently of his parents. Thus, because Jr. has never been present in Kentucky, the Board contends that he is a

resident of either Florida or Connecticut, and the Board consequently has no obligation to pay his educational expenses or provide educational services.

Because the IDEA does not contain a definition addressing the issue of residency, the Board contends that the Court must look to Kentucky law on the issue. In Kentucky, it is argued that the cases establish that the term "reside," for educational purposes, has been held to mean actual residence rather than legal domicile.

Furthermore, the Board directs the Court to KRS 2.015, which provides as follows:

> Persons of the age of eighteen (18) years are of the age of majority for all purposes in this Commonwealth except . . . for purposes of care and treatment of children with disabilities, for which twenty-one (21) years is the age of majority, all other statutes to the contrary notwithstanding.

The Board contends that this provision must be read in conjunction with KRS 387.500 *et seq.*, the statutory provisions dealing with guardianship and conservatorship for disabled persons. The Board points out that KRS 387.520 provides that Kentucky district courts shall have exclusive jurisdiction over all proceedings involving a determination of disability, and KRS 387.570 provides that the determination of disability is to be made by a jury. Furthermore, the Board notes that 707 KAR 1:180 Section 1.(2) provides that an "emancipated youth" is "[a] youth who has reached the age of majority, eighteen (18), and no evidence exists that there is a court order or legal document showing the parent as the guardian or youth's representative in educational matters. . . . " Applying these statutes and regulation to the present case, the

Board argues that the Hearing Office and Appeals Board were without authority to conclude that Jr. was disabled for the purpose of applying any Kentucky law or regulation. The Board also maintains that the actions of the defendants in securing state law determinations of disability and guardianship lend support to the Board's arguments that Jr. was not a resident of Kentucky prior to his parents being appointed as his guardians.

B. The Defendants' Argument

The defendants argue that there is no dispute that Jr. is a profoundly disabled child eligible for services under the provisions of the IDEA. The only dispute is whether Jr. is a resident of Fayette County. Because the IDEA imposes the obligation to educate all children between the ages of 3 and 21, the defendants contend that the Board was obligated under federal and state law to provide services for Jr. when his parents moved to Fayette County in June of 1994. The defendants also point out that KRS 2.015 expressly makes 21 the age of majority for children with disabilities.

The defendants' also devote a good portion of their memorandum to establishing that the Board violated the "stay-put" provision of the IDEA by not continuing to pay for Jr.'s education at Au Clair during the pendency of the underlying administrative proceedings and this action. As pointed out by the Board, the "stay-put" provision was the subject of the preliminary injunction hearing held last December. At that hearing, it was determined that the board would make payments to Au Clair for the months of November and December 1995, the parents

having in October become Jr.'s legal guardians. The parties also agreed to formulate an appropriate placement for Jr. for the remainder of the 1995-96 school year. Thus, the dispute in this matter concerns the period when the board refused to make payments from December of 1994 until November of 1995. Additionally, the Board is seeking reimbursement for payments made in the months of September, October, and November of 1994. Therefore, it appears to the Court that even if the Board did violate the "stay-put" provisions, the Court's decision here will effectively dispose of the matter. Whether the Board violated the "stay-put" provision is simply not relevant to the issue of whether Jr. was a resident of Fayette County during the disputed time period.

C. Analysis

The parties have been unable to direct the Court to any authorities which are directly on point and dispositive of the residency issue presented herein. Although both parties have cited numerous cases purporting to provide support for their respective position, both parties have been able to distinguish the opponents' cited cases. Regardless, none of the cited cases considered the situation presented in this case, specifically the residency of a disabled child over the age of eighteen when his parents move from one state to another and the child has never been present in the parents' new home state. Additionally, it should be pointed out that one of the cases relied upon by the plaintiff Board for the proposition that the residency of a student must be determined independently from the residency of the student's parents was reversed by the Sixth Circuit Court of Appeals on April 4,

1996 in *Wise v. Ohio Dept. of Educ.*, 80 F.3d 177 (6th Cir. 1996).

From a review of the relevant statutes and cases, it is clear to the Court that states participating in the IDEA are required to provide a free appropriate public education to all disabled students within the state between the ages of three and twenty-one.[1] There is no question that Jr. is a disabled child entitled to services under the IDEA. The only dispute concerns which LEA is responsible for providing those services. The Board's contention is simply that because Jr. was between the ages of 18 and 21, and his parents had not been appointed as his legal guardians, he had to be actually present in Fayette County in order for the Board to have an obligation to provide services.

The Sixth Circuit has made clear that a child does not have to be physically present to be considered "within the state." As the Sixth Circuit found in *Wise*, "within" includes children whose parents reside in the state but who receive services in or from another state. Thus, for

---

[1] Although the Statute provides that "with respect to children with disabilities . . . aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice . . . respecting public education within such age groups in the State," nothing indicates that providing education to a disabled child between the ages of eighteen and twenty-one is inconsistent with any law or practice in Kentucky. In fact, it appears that had Jr. actually been physically present in Fayette County, the board would not dispute its obligation to provide educational services.

example, in this case Jr. was "within" the state of Connecticut when his parents lived there, even though he was actually receiving services in Florida. In addition, the Sixth Circuit has concluded that under the IDEA, the responsible LEA is the one in which the parents reside. *Wise*, 80 F.3d at 182.

Furthermore, KRS 2.015 clearly provides that "[p]ersons of the age of eighteen (18) years are of the age of majority for all purposes in this Commonwealth except . . . for purposes of care and treatment of children with disabilities, for which twenty-one (21) years is the age of majority, all other statutes to the contrary notwithstanding." While the Board has correctly quoted the Kentucky statues dealing with the age of majority and judicial determinations of disability, the Court is unpersuaded that the statutes should be interpreted as urged by the Board. The Court notes that KRS 387.510(8) provides that the term "disabled" as used in KRS 387.500 to 387.770, and 387.990, means "a legal, not a medical disability. . . . " In addition, the Court notes that 707 KAR 1:180 Section 1.(2), defining the term "emancipated youth," relates to statutes which set forth the state statutory framework for special education programs for children and youth with disabilities, not KRS 2.015, the statute establishing the age of majority in the Commonwealth. Thus, the Court is convinced that the statutory language expressly provides that the age of majority for the care and treatment of children with disabilities is 21.

In light of the clear statutory language that the age of majority for the care and treatment of children with disabilities is 21, and the Sixth Circuit's conclusion in *Wise* that the responsible LEA is the one in which the parents

reside, the Court finds that during the time period in question, Jr., was a resident of Fayette County and the Board was obligated under the IDEA to provide him with a free appropriate public education.

V. The Defendants' Counterclaim

The defendants' have asserted counterclaims alleging that the Board violated the IDEA (20 U.S.C. § 1401 *et seq.*), Section 504 of the Rehabilitation Act (29 U.S.C. § 7904), the Americans with Disabilities Act (42 U.S.C. § 12132), and 42 U.S.C. § 1983. The defendants request that the Court grant declaratory relief declaring that the Board violated 20 U.S.C. § 1301, 29 U.S.C. § 794, 42 U.S.C. § 1983, the Fourteenth Amendment, KRS 157.200 *et seq.*, and the implementing regulations.

The Board argues that the counterclaim should be dismissed on numerous grounds. First, the Board notes that the counterclaim consists solely of allegations that the Board violated the various acts with no factual basis whatsoever alleged to support the claims. Thus, it is argued that the counterclaim fails to satisfy the requirements of Fed.R.Civ.P. 8.

Additionally, the Board argues that the counterclaim is founded on the core IDEA issues which are the subject of this dispute and no relief beyond that which might be available under the IDEA is requested. Therefore, it is urged that the counterclaim is redundant to the dispositive IDEA issues presented. In support of this contention, the Board offers various cases in which the courts have refused to entertain Section 504, Section 1983, and ADA claims in IDEA actions.

Concerning the defendants' § 1983 claims, the Board contends that inasmuch as the parents appealed the Board's decision to terminate services to a Hearing Officer and otherwise availed themselves of the due process procedures provided under 707 KAR 1:180, the parents have not been deprived of any protected interest without due process. Thus, to the extent that the counterclaim is deemed to assert a substantive due process violation, the Board contends that it fails to state a viable claim.

Furthermore, even if the Court were to conclude that the defendants' § 504, § 1983, and ADA claims may be asserted, these claims must be founded on the demonstration of intentional discrimination on the basis of a disabling condition. In this case, the Board maintains that the basis for its actions is the dispute concerning Jr.'s residency, not Jr.'s disability. Finally, the Board contends that Jr. is not "otherwise qualified" under the terms of § 504 because he was not a resident of Fayette County.

As pointed out by the Board, the defendants have offered no argument in support of their ADA claim. However, the defendants have argued that they have viable § 1983 and § 504 claims. In support of their position the defendants offer the affidavits of Ms. Gay Lang and Carolyn Cook, whose children continued to receive services after reaching the age of eighteen despite the fact that the parents did not obtain a guardianship. The board contends that these affidavits are irrelevant because the students and parents involved all resided in Kentucky.

A. Analysis

In this case, the core dispute is whether Jr. was a resident of Fayette County, thereby obligating the Board to pay for his educational services under the IDEA, discussed above. The defendants' counterclaim does not demand any relief beyond that which is available under the IDEA. Furthermore, because the defendants appealed the Board's decision to terminate services to a hearing officer, who found in their favor, the defendants can hardly claim a violation of their procedural rights. The Board properly appealed the hearing officer's decision, which was upheld by the Exceptional Children's Appeal Board. The board thereafter properly brought the instant action as a form of appeal.

In *Chuhran v. Walled Lake Consolidated Schools*, 839 F.Supp. 465 (E.D.Mich.1993), *aff'd* 51 F.3d 271 (6th Cir. 1995) (table decision), the plaintiff-student brought an action under the IDEA, the Michigan Mandatory Special Education Act, § 504 of the Rehabilitation Act, the ADA, and § 1983, challenging the decision concerning his eligibility for special education services. In considering Chuhran's claims under § 504 and the ADA, the court stated:

> In *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.ED.2d 746 (1984), the United States Supreme Court held that where the IDEA provides a remedy, it is the exclusive avenue for redress. In *Irving Independent School District v. Tatro*, 468 U.S. 883, 895, 104 S.Ct. 3371, 3378, 82 L.Ed.2d 664 (1984), decided on the same day as *Smith*, the Supreme Court stated, "§ 504 is inapplicable when relief is unavailable under the

> Education of the Handicapped Act (currently known as the "IDEA") to remedy a denial of educational services."
>
> The Court of Appeals for the Sixth Circuit addressed this issue in *Austin v. Brown Local School District*, 746 F.2d 1161 (8th Cir. 1984). The Sixth Circuit concluded that plaintiffs could not seek relief under the Rehabilitation Act of 1973 for the same wrong allegedly suffered by reason of defendant's failure to comply with requirements of the Education for All Handicapped Children Act, which provided the sole remedy for failure to provide appropriate public education. *Id.* at 1164.

839 F.Supp at 475. The court thereafter concluded that both the § 504 claim and the ADA claim were redundant to the claim brought under the IDEA, which provided the sole remedy.

In discussing Chuhran's § 1983 claims, the court noted that the Supreme Court has indicated that § 1983 is not a source of substantive rights, but is instead a method of vindicating federal rights conferred elsewhere. Thus, the court concluded:

> Chuhran's claim under § 1983 is entirely duplicative of his prior claims. All of his claims are statutory and each of those statutes provides a cause of action. Furthermore, Chuhran has not alleged specific deprivation of his rights under § 1983 apart from those rights he alleged in the statutes. Chuhran makes no claims that the Constitution or treaties of the United States have been violated, therefore, he has no cause of action under § 1983.

Id. at 475-76.

The Court finds the reasoning of *Chuhran* persuasive in this case. The defendants' remedy in this case is provided by the IDEA. The defendants' counterclaims are redundant and duplicative of the claims brought under the IDEA, and therefore will be dismissed.

IV. CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that:

(1) the plaintiff Board's motion for summary judgment [DE #13] is **GRANTED IN PART,** and summary judgment will be entered in favor of the Board on defendants' counterclaims; otherwise, the Board's motion for summary judgment is **DENIED;**

(2) the Court **FINDS** that at all times pertinent to this action the student, L.G.P., Jr., was a resident of Fayette County, Kentucky entitled to educational services under the IDEA, and the plaintiff Board was therefore obligated to provide or fund his educational services; and

(3) a judgment will be entered contemporaneously with this opinion and order in favor of the defendants on the issue of residency.

This 9th day of September, 1996.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

APPENDIX C
DECISION AND ORDER
EXCEPTIONAL CHILDREN APPEALS BOARD
DEPARTMENT OF EDUCATION
COMMONWEALTH OF KENTUCKY

In the matter of:

FAYETTE COUNTY PUBLIC SCHOOLS APPELLANT

AND

L.G.P. APPELLEE

OPINION AND ORDER

BACKGROUND

L.G.P. was born on November 25, 1974. At present, he is 20 years, 8 months of age. "G." has been identified as an individual with disabilities and his present placement is Au Clair Palms, Au Clair, Florida. He was placed at Au Clair in 1986 by the Bristol Public School District, Bristol, Connecticut. At the time of his placement, he was a resident of the Bristol Public Schools.

In June 1994 G.'s parents moved to Fayette County, Kentucky. They had informed the Fayette County Public Schools of their move and that they had a handicapped child placed in a residential facility in the state of Florida.

From August 19, 1994 to December 1, 1994 three ARC meetings were held by the Fayette County Public Schools with the parents present. Fayette County Public Schools initially recommended development of an individual education program for the child and assumed financial responsibility for his placement in Florida. By letter dated

December 10, 1994, the Fayette County Board of Education notified the parents that the child was not entitled to educational services within the district and that the district would provide no further services and would seek reimbursement of expenses incurred in serving the child.

By letter dated January 13, 1995 the parents requested a due process hearing. A hearing officer was assigned February 9, 1995. A prehearing conference was held on March 13, 1995. At this conference both parties agreed to facts presented. The hearing officer requested additional evidence. Both parties agreed to submit said evidence by affidavit. Therefore, no formal hearing was held. A decision was rendered on June 7, 1995.

ISSUE ON APPEAL

The LEA states the only issue on appeal is an issue of residency.

FINDINGS OF FACT

1. G. is a 20 year old with Downs Syndrome and functions in the severe range of mental disability. He has marked behavioral problems, including violent, destructive, and self-abusive behavior. He has a history of medical problems which prohibits using medication for his behavior problems. He requires 24 hour supervision by professional personnel.

2. The parents reside in Fayette County Kentucky.

3. At three ARC meetings, August 19, 1994, November 3, 1994 and December 1, 1994 issues concerning FAPE and the IEP which included transitional services were discussed.

4. On December 10, 1994 the attorney for the parents received a letter from the Fayette County Public Schools stating that the Fayette County Public Schools will no longer assume responsibility for providing services to the youth and will attempt to recover the costs expended to that date to Au Clair.

CONCLUSIONS OF LAW

IDEA imposes a number of procedural requirements to safeguard a students right to a Free Appropriate Public Education. These safeguards guarantees that parents will have an opportunity for input in decisions of their child's education program. These procedural safeguards may continue to ensure parents involvement until the disabled child reaches age 21.

DECISION AND ORDER

Appeals Board Order

Exceptional Children Appeals Board upholds the hearing officers decision and order dated June 7, 1995.

1. That the Fayette County Public Schools is responsible for the costs of the youth's education placement at Au Clair Palms, Florida, from the time other youth became a resident of the school district until such time as his

educational placement may be changed by an Admissions and Release Committee or he is no longer under the jurisdiction of the school district.

2. That the district shall within thirty (30) days convene an Admissions and Release Committee meeting to develop an individual education program for L.G.P. which shall include a transition plan in accordance with 707 KAR 1:220.

IT IS SO ORDERED:

This 31 day of July, 1995

/s/ Billy Stout
Billy Stout
Appeals Board Chairperson.
Taylorsville, Kentucky

/s/ Noreen Speckman
Noreen Speckman
Louisville, Kentucky

/s/ Shirley Surface
Shirley Surface
London, Kentucky

APPENDIX D

DECISION

Impartial Due Process Hearing

In the matter of:

Fayette County School District
Represented by Robert L. Chenoweth
Chenoweth Law Firm
121 Bridge Street
Frankfort, Kentucky 40601
(502) 223-1121

and

L.G.P.
Represented by Edward E. Dove,
Counsel for Parents
226 East High Street
Lexington, Kentucky 40507
(606) 252-0020

Patricia Walker FitzGerald
Hearing Officer
300 Republic Building
429 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
(502) 569-2777

STATEMENT OF THE ISSUE

This matter came before the Kentucky Department of Education, Division of Exceptional Children's Services, by request of the parents of L.G.P. for a due process hearing concerning the termination of educational services to their child.

The parents of the child moved to Kentucky in June, 1994. At that time their son, then nineteen (19) years old,

was living in the residential facility of Au Clair Palms in Mount Dora, Florida, where he was placed on or before April 5, 1988 by the Bristol Public School of the state of Connecticut. From August 19, 1994 to December 1, 1994 the parents attended three Admissions and Release Committee meetings to discuss their son's educational placement. Fayette County Public Schools initially commenced development of an individual education program for the child and assumed financial responsibility for his placement in Florida. By letter dated December 10, 1994, however, the Fayette County Board of Education notified the parents that the child was not entitled to educational services within the district and that the district would provide no further services and would seek reimbursement of expenses incurred in serving the child.

By letter dated January 13, 1995 and received by the Division of Exceptional Children Services January 23, 1995, the parents requested a due process hearing. A hearing officer was assigned February 9, 1995 and received notice of her appointment February 13, 1995. At the hearing officer's request, the parties submitted prehearing briefs regarding the issues of the case. At a prehearing conference held March 13, 1995 the parties stipulated that there were no facts in dispute and that such evidence as the hearing officer requested would be submitted by affidavit. The 45-day time limit for rendering a decision was extended in order to permit the filing of certain documentation requested by the hearing officer and to permit the hearing officer additional time to research a matter which appeared to be a case of first impression within this district.

WITNESSES and EXHIBITS

As the matter was submitted on briefs, there were no witnesses. The following exhibits are included in the record:

PARENTS' EXHIBITS:

Exhibit #1 Report of Bob McLaughlin dated Sept. 16, 1994

Exhibit #2 Letter of Dr. James R. Fisher, Sept. 20, 1994

Exhibit #3 Affidavit of Gay Lang dated March 15, 1995

Exhibit #4 Supplemental Affidavit, Lang, April 6, 1995

Exhibit #5 Affidavit of Carolyn Cook, April 11, 1995

HEARING OFFICER'S EXHIBIT:

Exhibit #1: Letter of Ed Dove dated January 13, 1995

FINDINGS OF FACT

1. The youth who is the subject of this proceeding was born November 25, 1974, and is now twenty years old. The youth has Downs Syndrome and functions at the level of one with severe mental retardation. He has marked behavior problems, including violent, destructive, and self-abusive behavior. He is currently generally in good health, although he has had significant past medical problems requiring open heart surgery, hernia repair, and stomach surgery. He has some neurological symptoms suggestive of possible right motor strip injury.

Because of his medical condition, he cannot be medicated for his behavior.

2. Because of his low functioning and destructive, self-abusive behavior, the youth requires 24-hour supervision by professional personnel. He requires the attention of a highly skilled behavior modification specialist just to maintain his behavior within reasonable limits and avoid harming himself, and also requires supervision by individuals trained in medical treatment for nosebleeds, as his self-abusive behavior includes self-induced nosebleeds.

3. The parents of the youth resided in Bristol, Connecticut, until June, 1994, at which time they moved to Lexington, Fayette County, Kentucky.

4. The youth resided with his parents in Bristol, Connecticut, where he attended school until his behavior deteriorated to the point that he became extremely destructive and violent at home and began regressing from the previously good progress he had been making at school. Following a determination by the Bristol Public Schools that a residential placement was necessary and appropriate, the Bristol school district placed the youth at Au Clair Palms, a residential facility in Mount Dora, Florida. The record is somewhat unclear as to the actual date of the youth's placement at Au Clair. Although counsel for both parties indicate that the youth has been at Au Clair since 1986, a report by Bob McLaughlin prepared for the Fayette County Schools indicates that he was placed at Au Clair on April 5, 1988. It is undisputed, however, that the youth was placed by his local education agency in an out-of-state residential facility at least seven

years ago, and that he has remained there since. In accordance with federal law, the placing state has in place a transition plan for the youth.

5. Prior to their move to Kentucky, the parents notified the LEA of their intent to move to this state. A request was made that the district's director of special education participate by telephone in an ARC meeting held in Bristol immediately prior to the parents' move, but this was not done.

6. On August 19, 1994, following the parents' move to Kentucky, the LEA held an Admissions and Release Committee (ARC) meeting to review the youth's educational program. At that meeting, the ARC decided that the youth should remain in his current residential placement first provided by the school district in Connecticut while the LEA investigated services necessary to develop a program within the local school district. The district assumed financial responsibility for the youth's residential placement and hired a consultant, Dr. John Schuster, of the University of Kentucky, who, with Bob McLaughlin, the Director of Instructional Services for the LEA, went to Florida to observe the youth and evaluate his current education program. Mr. McLaughlin submitted to the school district a written report prepared with Dr. Schuster's assistance and indicating the youth's need for a 24-hour a day behavior/academic program and making specific program recommendations. His report concludes that the youth is "under extremely good instructional control," that he believes the youth's behavior is under control *only* because of his current 24-hour program, and that it would be very difficult for the school district to meet the child's needs within the district. He

recommends that while exploring all possible options for the youth, the youth's current placement be maintained as "to transition him to Kentucky or any other State program would be detrimental to him and virtually impossible to accomplish prior to his 21st birthday." He also recommended exploring options for financial assistance and an immediate transition meeting to amend the youth's IEP to reflect Kentucky's involvement with him after he turns twenty-one (21).

7. A second Admissions and Release Committee meeting was held November 3, 1994 to discuss the youth's program and the possibility of developing a transition plan that would enable the child to be brought to Kentucky. A third Admissions and Release Committee meeting was scheduled for and held on December 1, 1994, at which time a transition plan was further discussed.

8. On December 10, 1994 the parents' attorney received a letter from the attorney for the local Board of Education dated December 8, 1994 and terminating services to the child based on the fact that "[i]t became clear during the December 1, 1994, ARC meeting" that the youth's parents do not have legal guardianship of him. The letter further stated that the district had no obligation to provide services to the youth and would not work further on developing a special education program for him. Finally, the letter indicated that the district would attempt to recover the costs expended to that date to Au Clair pursuant to its ARC agreement, which was developed in the belief that the parents "had the legal right to deal with" the school district concerning their son and that he was entitled to services in the district. The letter

did not address whether any appeal of the district's decision was available to the parents.

9. As evidenced by the uncontroverted affidavits of Carolyn Cook and Gay Lang, the district has permitted parents whose children are physically located within the school district and who are over the age of eighteen (18) to continue to participate in the development of their children's special education programs.

CONCLUSIONS OF LAW

I.

STANDING OF THE PARENTS

In its letter of December 8, 1994, the district stated its determination that since the parents of the youth did not have legal guardianship of him, the parents did not "have the legal right to deal with" the school district on their son's behalf.

The district asserts that absent a judicial or other legal determination to the contrary, individuals in this Commonwealth attain the age of majority at eighteen (18), after which their parents no longer have "unilateral control" of their lives. This, says the district, "presents a jurisdictional problem as to who is empowered to request a due process hearing" regarding provision of an appropriate educational program. In support of its position that the parents lack standing to act on their son's behalf in the educational process, the school district cites 707 KAR 1:180 for the proposition that the youth is emancipated and therefore represents himself in educational decision making. The parents rely on KRS 2.015, which provides

that the age of majority for purposes of care and treatment of children with disabilities is twenty-one (21), and assert that they continue to be the youth's legal guardians.

The Individuals with Disabilities Education Act, 20 USC Section 1400 et seq. (IDEA), imposes on participating states a number of procedural requirements to safeguard a student's right to education. These procedural safeguards guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate. Section 1415; 34 C.F.R. Section 300.500 et seq.; *Honig v. Doe,* 484 U.S. 305, 311 (1988). These procedural safeguards continue to protect the parent's involvement after a child reaches the age of eighteen (18), even though there has been no legal adjudication of disability and no guardianship has been established for the child. *Mrs. C. v. Wheaton,* 916 F.2d 69 (2nd Cir. 1990). If a state provides education to children between the ages of eighteen (18) and twenty-one (21), as does Kentucky, it must provide the children *and their parents* all of the due process guarantees of IDEA. *Id;* 34 C.F.R. Section 300.300(b)(4). A participating state must comply with the substantive standards of IDEA whether or not its own standards are consistent with, or as exacting as, those of IDEA. *David D. v. Dartmouth School Committee,* 775 F.2d 411, 422 (1st Cir. 1985), cert. denied, 475 U.S. 1140 (1986). Thus, where a state terminated services to a twenty (20) year old student with his consent but without notice to his mother or surrogate parent because the student was

legally competent, the state violated the due process provisions of IDEA protecting parental involvement. *Mrs. C. v. Wheaton, supra,* at 73.

While 707 KAR 1:180 Section 9(2)(a)(1) permits a youth over eighteen (18) and without a legal guardian to represent himself, the chapter as a whole clearly protects the right of parents to remain involved. 707 KAR 1:180 Section 1(6) defines "Procedural Safeguards" as "all rights guaranteed to the parent and the child with disabilities under Subpart E of the Individuals with Disabilities Education Act (IDEA)." Section 4 provides that each ARC meeting shall include the parent, and shall also include the child, where appropriate. Section 5 guarantees that each ARC shall follow due process procedures to ensure that children *and their parents* are guaranteed procedural safeguards. Protection of the parent's rights continue throughout the chapter, including Section 9, which provides that the LEA "shall assure that each child or youth is represented by a parent at all decision making points in the identification, evaluation, and placement process." Nowhere in the state or federal regulations is there an indication that parents are included in the process only until a child attains the age of eighteen (18).

There is a very practical reason for the requirement that parents continue to have meaningful input into the decision making process after their children attain the age of eighteen (18): to properly protect the child's right to an education, any decisions must be made on an informed basis. Thus, any possibel [sic] conflict between the right of an individual over eighteen (18) to represent himself and exercise his free will and that of a parent to make decisions on his behalf "can only arise where the youth

can make informed decisions and all procedural safeguards are followed." *See Mrs. C. v. Wheaton, supra,* at 74.

The youth in this matter functions in the range of severe mental retardation. Under the school district's analysis, as the youth cannot in any sense of the concept represent himself, he would have no representation whatsoever. Such a result is clearly outside of the intent and purpose of IDEA.

Finally, it must be noted that the school district permits the parents of children over eighteen (18) to authorize educational placements for their children when their children are physically within the district, and should be estopped from applying a different standard regarding representation of a child who is not physically within the district.

For the foregoing reasons, under IDEA the parents of G.L.P. do in fact have standing to seek an appropriate educational placement for their son and to request a due process hearing following a denial of services. As IDEA specifically mandates parental involvement at all decision making points in the process, the hearing officer does not address the parents' argument under KRS 2.015.

II.

RESIDENCY

In addition to questioning the standing of the parents to represent their child's interest in dealing with the school district, the district asserts that the youth is not entitled to services in its district because he is not a resident of Kentucky.

The parents have objected to this argument as "issue switching," noting that the only reason initially given for the district's termination of services was that they did not have guardianship. However, the district did indicate in its letter terminating services that the youth was not entitled to services in the district and its counsel raised the issue of residency in its brief dated March 6, 1995 and again at the telephonic prehearing conference. Even if the issue had not been raised previously, this hearing officer finds that it must be addressed, as residency is a jurisdictional prerequisite to the duty of a district to provide services to a child.

It is the position of the parents, who reside in the district, that a child's residence is that of his parents. The parents contend that although their son is currently in a residential program in Florida, because of his disability he has not reached the age of majority and his legal residence is therefore Kentucky. The district argues that because the youth is over eighteen (18) and has no legal appointed guardian, his residence is Florida and Kentucky has no obligation to serve him.

IDEA establishes the right of disabled children to a free, appropriate public education through the age of twenty-one (21). As interpreted by the U.S. Department of Education, Office for Civil Rights, it is residence which creates the duty under the statute and the regulations, "not the location of the child or school." According to that office, a child's residence for purposes of eligibility for a free appropriate public education is the state in which: (1) his parent or guardian resides; or (2) the child is a ward of the state. 21 IDELR 81, at 82. There is no indication in IDEA that a different standard is to be

applied to children between the ages of eighteen (18) and twenty-one (21).

KRS 2.015 provides that "[p]ersons of the age of eighteen (18) years are of the age of majority for all purposes in this Commonwealth except for the purchase of alcoholic beverages and for purposes of care and treatment of children with disabilities, for which twenty-one (21) years is the age of majority, all other statutes to the contrary notwithstanding."

The school district asserts that since there is no definition given of "children with disabilities," and no one "common or normal" usage of the term which may be applied, this statute creates a statutory presumption that one who has reached his eighteenth birthday has reached the age of majority which can be rebutted by a legal determination of disability. Such an interpretation of this statute defies the basic rules of statutory construction. To accept the argument of the district would render entirely meaningless the portion of the statute which states "except . . . for purposes of care and treatment of children with disabilities, for which twenty-one (21) is the age of majority."

Individuals who have a guardian appointed are under a legal disability, as are minors. To require a guardianship in order to extend the legal disability of minority is inconsistent with the plain intent of the statute in derogation of KRS 446.080(1), which provides that all statutes "shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." The clear and unambiguous intent of this statute is to extend minority status for children with disabilities

until such time as they reach the age of twenty-one (21). Clear and unambiguous language in a statute will be held to mean what it plainly expresses, and one must interpret a statute to effect the intent and purpose of those who enacted it. *Hawley Coal Co. v. Bruce,* 67 SW2d 703 (Ky. 1934); *Green v. Moore,* 135 SW3d 682 (Ky. 1938); *Baker v. White,* 65 S.W3d 1022 (Ky. 1933). While there may be instances in which there might be disagreement as to whether a child's disability is severe enough to bring this statute into play, that is not the case before us. The youth in question in this matter is severely disabled by any definition one might use. Functioning in the range of severe mental retardation with an age equivalent of two years, five months, there can be no question that he lacks the capacity to make informed decisions on his own behalf. The psychological report provided by Au Clair ranks the child's adaptive behavior below one-tenth of one percentile and indicates that he requires 24-hour custodial care. To require a separate legal proceeding to determine whether this youth is a child "with disabilities" would completely defeat the purpose of KRS 2.015.

As all evidence indicates, and there is no dispute, that this youth has severe, multiple disabilities, and as there has been no contention that educational services do not constitute "care and treatment," under Kentucky law, the youth has not reached the age of majority and his parents continue to be his natural, legal guardians. This conclusion is also consistent with IDEA, as set forth above. It is also consistent with authority cited by the school district.

In support of its position, the district cites 21 IDELR 746, which it states holds that where a district placed a

student in an out-of-state program and his mother moved out of the placing district after the child turned twenty-one (21), the student would not be considered a resident of the placing state without having a legal guardian in that state and his residence would be either the state of his mother's residence, *if* she was his legal guardian, or in the state where he was receiving services. In fact, that case held specifically:

> When a student is in a residential placement, that student's residence is considered to be that of his or parents. If D. had been living at home and attending local schools, his eligibility to continue in the Board's schools would have been questioned when his mother moved out of state. If D. could establish that he continued to reside with "relatives or nonrelatives" in the Board's district . . . or if he had established his own residence, independently, within the school district, he could have continued to be eligible for school enrollment within the Board's schools. The same rules apply for a student in residential placement.

The hearing officer then noted that under Connecticut law, "after D.'s mother moved to Illinois when D. was twenty-one (21) years of age and had no legal guardian, D.'s residence, for school enrollment purposes, would either be with his mother in Illinois or where he actually was, in Rhode Island." *Id.* at 749.

The district correctly notes that, for school purposes, a child's residence is not *necessarily* that of his parents. However, the authority cited in support of that position was designed to protect the right of children to attend school in the district where they were physically present,

"the purpose being not to debar from school privileges any child of school age found within the district under the care, custody, or control of a resident thereof . . . if the child and its parent, or the person in loco parentis, are actually resident in the district, with apparently no present purpose of removal." *Crain v. Walker*, 2 SW3d 654 (1928); OAG 77-311. This does not apply, however, where a child is placed across state lines but where the agency or individual placing the child retains custody and control as well as financial responsibility for the child, in which case the placing agency or individual retains control and responsibility for the child, including responsibility for the child's educational placement. *See*, 21 IDELR 81, *supra*.

This distinction is of critical importance as a matter of fundamental fairness to the parents of severely disabled children requiring residential placement, where the issue of residence arises solely due to the fact that, because of a child's severe disability, he is unable to live at home with his family.

The youth in this matter is a child with disabilities who has not attained the age of majority under Kentucky law. While his parents remained in Connecticut, although the youth physically located in the State of Florida, his legal residence continued to be Connecticut. When the parents left Connecticut, that state lost jurisdiction of the child for educational purposes. As the child has no independent ability to establish residency, and as he is not a ward of any state, his residence for educational purposes continued to be the residence of his parents. The youth is a resident of Kentucky and has been since his parents moved to this state in June, 1994. s [sic] such, he has,

since June, 1994, been entitled to a free, appropriate education provided by the school district in which his parents reside.

III.

DUE PROCESS

34 C.F.R. Section 300.504(a) requires that "[w]ritten notice . . . must be given to the parents of a child with a disability a reasonable time before the public agency – (1) Proposes to initiate or change . . . the provision of FAPE to the child." The content of the written notice must include a full explanation of all the procedural safeguards available to the parent, including the right of the parent to request a hearing regarding the agency's decision. Section 300.505(a)(1); Section 300.506(a).

Kentucky Administrative Regulations provide similar due process requirements. The LEA *"shall"* provide written notice to parents each time the LEA proposes or refuses to change the provision of a free, appropriate public education, and such notice shall provide a "full explanation of all the procedural safeguards available to the parents under Subpart E of Part B of IDEA. 707 KAR 1:180 Section 6.

Unilateral termination of services is certainly a change in the provision of a free, appropriate, public education, and it does trigger the full procedural protections of IDEA, regardless of the basis for the action. *Mrs. C. v. Wheaton, supra.* To terminate services being provided on the basis of a perceived lack of jurisdiction does not obviate the need for due process requirements. At a minimum, it is the duty of the LEA to notify the parents of

their right to a hearing on *"any matter* concerning . . . the provision of a free, appropriate public education. 707 KAR 1:180 Section 11 (emphasis added). The proper procedure would be first to reconvene the ARC. *Supra,* Section 5.

In this case, there was no discussion of termination of services at the December, 1994 ARC meeting. There was no attempt to reconvene the ARC, and there was no written notification to the parents of their right to request a hearing, or the procedure for doing so. The manner in which the school district terminated its services to the youth violated the procedural requirements of IDEA.

DECISION AND ORDER

After full consideration of all the relevant facts and laws, and for the reasons stated above,

IT IS HEREBY ORDERED:

1. That the Fayette County Public School is responsible for the costs of the youth's education placement at Au Clair Palms, Florida, from the time the youth became a resident of the school district until such time as his educational placement may be changed by an Admissions and Release Committee or he is no longer under the jurisdiction of the school district.

2. That the district shall within thirty (30) days convene an Admissions and Release Committee meeting to develop an individual education program for L.G.P. which shall include a transition plan in accordance with 707 KAR 1:220.

3. Within thirty (30) calendar days of this entry of this Order, either party may appeal this decision by submitting a written appeal by certified mail to the Chairperson, Exceptional Children Appeals Board, Kentucky Department of Education.

/s/ Patricia Walker FitzGerald
Patricia Walker FitzGerald
Hearing Officer
Walker & Radigan
300 Republic Building
429 West Muhammad Ali Blvd.
Louisville, Kentucky 40202
(502) 569-2777

June 7, 1995
Date

APPENDIX E

FEDERAL STATUTES

20 U.S.C.A. § 1412(2)(B), (C) (WEST 1990)

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to Sec. 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that –

(A) there is established

(i) a goal of providing full educational opportunity to all children with disabilities,

(ii) a detailed timetable for accomplishing such a goal, and

(iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978, and for all children with disabilities

between the ages of three and twenty one within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

* * *

---

20 U.S.C.A. § 1412(a)(1)-(3) (WEST SEPTEMBER 1997 SUPP.)

(a) in general

A State is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children:

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this part be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility:

(I) were not actually identified as being a child with a disability under Sec. 1401(3) of this Act; or

(II) did not have an individualized education program under this part.

(2) Full educational opportunity goal

The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

* * *

---

20 U.S.C.A. § 1414(a)(1)(A) (WEST 1990)

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under Sec. 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall –

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which –

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special

education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

* * *

---

20 U.S.C.A. § 1413(a)(1) (WEST SEPTEMBER 1997 SUPP.)

(a) In general

A local educational agency is eligible for assistance under this part for a fiscal year if such agency demonstrates to the satisfaction of the State educational agency that it meets each of the following conditions:

(1) Consistency with State policies

The local educational agency, in providing for the education of children with disabilities within its jurisdiction, has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under Sec. 1412.

* * *

APPENDIX F

STATE STATUTES

KRS 158.030(1)

(1) "Common school" means an elementary or secondary school of the state supported in whole or in part by public taxation. No school shall be deemed a "common school" or receive support from public taxation unless the school is taught by a certified teacher for a minimum school term as defined by KRS 158.070 and every child residing in the district who satisfies the age requirements of this section has had the privilege of attending it. Provided, however, that any child who is six (6) years of age, or who may become six (6) years of age by October 1, shall attend public school or qualify for an exemption as provided by KRS 159.030. Any child who is five (5) years of age, or who may become five (5) years of age by October 1, may enter a primary school program, as defined in subsection (2) of this section.

* * *

KRS 158.100

Notwithstanding any statute to the contrary, each school district shall provide an approved preschool school program through twelve (12) grade school service. An approved preschool school program through eight (8) grade school services shall be provided for the children residing in the district by maintaining schools. An

approved high school services for all children of high school grade under twenty-one (21) years of age residing in the district shall be provided either by maintaining the schools within the district or by contract with another district. The board of education of any school district, subject to the approval of the chief state school officer, may establish night schools, industrial schools, and other schools for the residents of the district as it deems advisable.

KRS 157.200(1)

(1) "Exceptional children and youth" means persons under twenty-one (21) years of age who differ in one (1) or more respects from average or normal children in physical, mental, learning, emotional, or social characteristics and abilities to such a degree that they need special educational programs or services for them to benefit from the regular or usual facilities or educational programs of the public schools in the districts in which they reside.

* * *

KRS 387.500

(1) It is the intent and purpose of the General Assembly to recognize that disabled persons have varying degrees of disability.

(2) Persons who are only partially disabled must be legally protected without a determination of total incompetency and without the attendant deprivation of civil and legal rights that such a determination requires.

(3) To this end, guardianship and conservatorship for disabled persons shall be utilized only as is necessary to promote their well-being, including protection from neglect, exploitation, and abuse; shall be designed to encourage the development of maximum self-reliance and independence in each person; and shall be ordered only to the extent necessitated by each person's actual mental and adaptive limitations.

(4) If the court determines that some form of guardianship or conservatorship is necessary, partial guardianship or partial conservatorship shall be the preferred form of protection and assistance for a disabled person.

KRS 387.510(8)

* * *

(8) "Disabled" means a legal, not a medical disability, and is measured by functional inabilities. It refers to any person fourteen (14) years of age or older who is:

(a) Unable to make informed decisions with respect to his personal affairs to such an extent that he lacks the capacity to provide for his physical health and safety, including but not limited to

health care, food, shelter, clothing, or personal hygiene; or

(b) Unable to make informed decisions with respect to his financial resources to such an extent that he lacks the capacity to manager his property effectively by those actions necessary to obtain, administor, and dispose of both real and personal property.

Such inability shall be evidenced by acts or occurrences within six (6) months prior to the filing of the petition for guardianship or conservatorship and shall not be evidenced solely by isolated instances of negligence, improvidence, or other behavior.

* * *

KRS 387.570

(1) At a hearing convened pursuant to KRS 387.500 to 387.770 for the purpose of determining the disability of a respondent, the respondent shall have a jury trial and shall have the right to present evidence and to confront and cross-examine all witnesses.

(2) The hearing may be closed to the public on request of the respondent or his counsel.

(3) The respondent shall be present at the hearing, and his presence may be waived only upon a determination of the court that his attendance would subject him to serious risk of harm. Such determination shall be evidence only of the respondent's inability to attend the

hearing and shall not be considered in determining the need for guardianship or conservatorship.

(4) The court may remove itself to the place of residence of the respondent to conduct the hearing in the presence of the respondent.

(5) The burden of proof shall be on the Commonwealth to prove the disability or partial disability of the respondent by clear and convincing evidence.

(6) The respondent will not be determined partially disabled or disabled unless at least one (1) of the persons who participated in the interdisciplinary evaluation required by KRS 387.540 testifies in person at the hearing. This section shall not be interpreted to preclude the respondent from requiring the testimony of more than one (1) person participating in the preparation of the evaluation report.

KRS 2.015

Persons of the age of eighteen (18) years are of the age of majority for all purposes in this Commonwealth except for the purchase of alcoholic beverages and for purposes of care and treatment of children with disabilities, for which twenty-one (21) years is the age of majority, all other statutes to the contrary notwithstanding.

APPENDIX G

STATE REGULATION

707 KAR SECTION 1(2)(a)

* * *

(2) "Emancipated youth" means:

(a) A youth who has reached the age of majority, eighteen (18), and no evidence exists that there is a court order or legal document showing the parent as the guardian or youth's representative in educational matters; or

(b) A youth who is married.

* * *

Supreme Court, U.S.
FILED
MAR 9 1998
OFFICE OF THE CLERK

(2)

No. 97-1284

In The

Supreme Court of the United States

October Term, 1997

FAYETTE COUNTY BOARD OF EDUCATION,

Petitioner,

vs.

LGP SR., TP, LGP JR.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Lutz Appellate Services, Inc.

QUESTION PRESENTED

Whether the Sixth Circuit Court of Appeals committed error in affirming the United States District Court decision finding that a disabled student who had reached the age of eighteen (18) was a resident of the state in which his parents resided for the purpose of the receiving a free and appropriate education under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400, *et seq.*

RULE 29.6 STATEMENT

The parties to the proceeding below were the Fayette County Board of Education, Petitioner, and LGP SR., T.P., and LGP JR., Respondents. There is no corporate affiliation of any party to this proceeding.

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This case involves a decision of the Sixth Circuit Court of Appeals affirming the decision of the United States District Court for the Eastern District of Kentucky at Lexington which affirmed an administrative decision of the Kentucky Department of Education. The decision found the Respondent at all times relevant a resident of Fayette County, Kentucky, the residence of his parents. As a resident of Fayette County, Kentucky the Petitioner owed the child a free and appropriate education pursuant to 20 U.S.C. § 1400, *et seq.* (Hereinafter IDEA).

STATE REGULATION INVOLVED

707 KAR 1:180(11). App. A.

707 KAR 1:180 § 9(2)(a)(1) and (2). App. B.

STATEMENT OF CASE

The action below was filed in United States District Court by the Petitioner appealing the decision and order of the Exceptional Children Appeals Board, Department of Education, Commonwealth of Kentucky (hereinafter Appeals Board dated July 31, 1995). This action arose from a due process complaint filed by the Respondent in December 1994 (pursuant to 707 KAR 1:180). The due process request was filed after the Petitioner unilaterally terminated educational services to the child on December 8, 1994.

The parties stipulated during the administrative process that the student was a child with a disability eligible for educational services pursuant to IDEA and state implementing regulations. The issue sought to be reviewed was the residency status of the child after his family moved to Fayette County, Kentucky, from Bristol, Connecticut.

The parties submitted the issue to Hearing Officer Hon. Patricia Walker Fitzgerald. The Hearing Officer found at all times relevant the child to be a resident of Fayette County eligible for educational services. The Petitioner appealed the Hearing Officer's decision to the Exceptional Children's Appeals Board, Kentucky Department of Education. The Appeals Board affirmed the Hearing Officer's decision. The Petitioner was dissatisfied with the well-reasoned opinion rendered during the administrative process. The Petitioner filed a complaint in United States District Court at Lexington, Kentucky, requesting review. The District Court's jurisdiction over the issue was pursuant to 20 U.S.C.A. § 1415(e)(14) as well as 20 U.S.C.A. § 1415(e)(1). During this time the Petitioner continued to deny the child services.

The Respondent moved the District Court for injunctive relief in December 1995. The court ordered the Petitioner to provide educational services to the child dating from November 1, 1985 until June 1996, the expiration of the current Fayette County School year. The court further stated that services could be continued for the child if it was the consensus of the Admission and Release Committee that it was in his best educational interest.

Prior to the court's December 1995 ruling the parents obtained guardianship of their son pursuant to KRS 387, *et seq*. The parents were legally required to obtain guardianship because their son was to reach the age of emancipation (twenty-one (21) in Kentucky due to his disability and KRS 2.015) in November 1995. The Fayette District Court found the child to be a resident of Fayette County, Kentucky, and awarded the parents guardianship.

On September 9, 1996 the United States District Court found that the child became a resident of Kentucky when his

parents established their residence in state (June 1994). By per curiam opinion rendered November 6, 1987 the United States Court of Appeals for the Sixth Circuit affirmed the District Court's opinion concerning residency of the child.

SUMMARY OF THE ARGUMENT

The Petitioner has presented this case as one involving a relationship between state law involving guardianship and incompetency of a disabled child over the age of eighteen (18), the residency of the child and the educational duty owed to the child pursuant to state law and IDEA. In 1996 the Sixth Circuit decision in *Wise v. Ohio Department of Education,* 80 F.3d 177 (6th Cir. 1996) effectively answered the question of a duty owed to a child placed out of district for educational purposes. The court in clear terms stated that the state educational agency shall be responsible for assuring that all children with disabilities within the state receive educational services. The Sixth Circuit continued to state Congress defined "within" (the state) as including children whose parents reside in the state but who receive services in or from another state. (at 182).

The Petitioner can only advance his argument by attempting to convince the Court that when the Respondent LGP, Jr., became eighteen (18) years of age he was emancipated. At that point LGP, Jr., was competent to make his own decisions concerning his residence and his educational placement. The fallacy of the Petitioner's argument is that it fails to address the significance of KRS 2.015. The statute establishes the age of emancipation for a disabled Kentucky child to be twenty-one (21) all other provisions of Kentucky law not withstanding.

REASONS FOR DENYING THE WRIT

I.

THE COURT HAS NOT BEEN PRESENTED A COMPELLING REASON TO GRANT CERTIORARI BY THE PETITIONER.

The parties agree that Congress in drafting IDEA did not define residency for the purposes of providing educational services. However, Congress did direct states to develop plans for providing a "free and appropriate education for all children between the ages of three (3) and twenty-one (21) within the state (20 U.S.C. § 1412(2)(B)). In order to receive federal financial assistance under IDEA a state must develop a plan to provide a free and appropriate education to all children residing in the state between ages three (3) and 21 (twenty-one) 20 U.S.C.A. § 1412(a)(1)(A).

The facts are not in dispute. When the Respondents moved to Fayette County, LGP, Jr., had been placed by the Bristol, Connecticut, Schools at Au Clair Palms, Mt. Dora Florida. It was consensus of the Admissions and Release Committee in Bristol that the Respondent could receive a free and appropriate education at the facility. It is also undisputed that the child is severely disabled with an I.Q. of approximately 40.

The appropriate nature of the child's placement at Au Clair was never questioned by the Petitioner during the months of August 1994 through December 1994. The Admissions and Release Committee deemed it an appropriate placement and paid the child's tuition until they choose to unilaterally terminate services.

As has been previously stated in *Wise* "a child might be placed in another state but is considered a resident of the state

in which his parents reside." Likewise, the Second Circuit in *Catlin v. Sobol,* 93 F.3d 1112 (2nd Cir. 1996) held "Thus, the statute assigns ultimate responsibility, including financial responsibility, to the home district and state the place where the parents reside." Pursuant to the court's well-reasoned opinions the district of residence for the child was Fayette County.

The Petitioner's reliance on *Susan R.M. v. Northeast Independent School District,* 818 F.2d 455 (5th Cir. 1987) is misplaced. The Petitioner's attempts to convince this Court that there is a split in the circuits demand this Court's review. The Plaintiff's assessment is erroneous. *Susan R.M.* is easily distinguished from the Respondent's case. *Susan R.M.* addressed standing to bring an action for deprivation of an appropriate education to a child who had reached the age of eighteen (18); *Susan R.M.* did not address the issue of residency.

In *Susan R.M.* the child's father brought suit on behalf of his disabled daughter claiming a violation of the Education for All Handicapped Children Act. 20 U.S.C. § 1401, *et seq.* The District Court dismissed the action because the child had reached the age of emancipation, eighteen (18) in Texas. The Fifth Circuit Court affirmed the District Court's decision that the father lacked standing to challenge the denial of appropriate education for his daughter..

The important distinction between *Susan R.M.* and the Sixth Circuit decision is the application of state law. The application of Kentucky statutory provisions establish that LGP. Jr., was not emancipated until he reached the age of twenty-one (21). The parties solely responsible for his educational well being were his parents. *See* KRS 405.020(2). Additionally, Texas Code 129.001 defines age of majority as eighteen (18) years. KRS 2.015 states

> that all persons of the age of eighteen are of the age of majority except for purpose of care and treatment of children with disabilities which twenty-one (21) is the age of majority. All other statues to the contrary not with-standing.

The distinction between the two statutes is obvious and while the Fifth Circuit Court's analysis in *Susan R.M.* was correct, the application by the Sixth Circuit was proper under the facts of L.G.P.

II.

THE FAYETTE DISTRICT COURT PROPERLY AWARDED GUARDIANSHIP TO THE PARENTS DUE TO CHILD'S RESIDENCY.

In October 1995 the parents were appointed guardians of the child prior to his twenty-first birthday pursuant to the provisions of KRS 387, *et seq.* KRS 387.520(2) limits the jurisdiction of the Fayette District Court to appointment of guardianship for individuals in the county where the Respondent or ward resides, or where the parents of the ward reside if the ward is a minor. Fayette District Court found the child a resident with full knowledge of his placement in Florida.

The evidence presented to the court clearly established the child with an I.Q. of 40 could not form the intent to determine his residency. Without the ability to form the knowledgeable intent to express his own wishes concerning residency the residency becomes that of his parents. *Martinez v. Bynum,* 461 U.S. 330, 103 S. Ct. 1838, 75 L. Ed. 2d 879 (1984) *See also Wise.*

III.

FAYETTE COUNTY FAILED TO APPOINT A REPRESENTATIVE OF THE CHILD.

The Petitioner argued that the parent could not represent their child's educational interest due to the fact he was over eighteen at the time the family moved to Fayette County.

The law also placed the burden on the Petitioner to appoint a representative for the child if his educational representation was under scrutiny.

No later than at the time of referral, the LEA shall determine if the child or youth is: (1) emancipated and, therefore, represents himself in educational decision making; or (2) to be represented by an adult *such as a parent, a guardian, or person acting as a parent,* a surrogate parent. 707 KAR 1:180 § 9(2)(a)(1) and (2)

At no time from August 1994 to December 1994 knowing the child's age did Petitioner appoint a surrogate parent or question the parents right to speak on behalf of their child. It was only after the Petitioner realized the cost of educating the child in residential placement that they moved to terminate their commitment to his educational plan. The Respondent had a duty to appoint a representative to protect the child's interest. They acknowledged the parents as the child's representative until December 1994. The Respondent's argument that the parents were not the child's educational representatives during August 1994-December 1994 would have left the child without a representative. The Petitioner has attempted to convince the administrative and judicial bodies throughout the Sixth Circuit that they acted appropriately. The Petitioner's arguments have been rejected by all authorities.

CONCLUSION

IDEA has left the issue of a student's residency for educational purposes to the state. The Sixth Circuit properly addressed the relationship between Kentucky law and IDEA in rendering its decision. The Petitioner has not presented a compelling reason why this Court should accept the review. The Petitioner has not successfully presented an issue which complies with considerations governing review on petition of certiorari, Supreme Court Rule 10.

Respectfully Submitted,

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APPENDIX A — 707 KAR 1:180(11)

Section 11. Due Process Hearings. A parent or LEA may initiate a hearing on any matter concerning the identification, evaluation, placement or the provision of a free appropriate public education. The LEA shall inform the parent of any free or low-cost legal and other relevant services available in the area if the parent requests the information.

APPENDIX B — 707 KAR 1:180 § 9(2)(a)(1) AND (2)

Section 9. Representation. (1) The LEA shall assure that each child or youth is represented by a parent at all decisionmaking points in the identification, evaluation, and placement process and relative to a free appropriate public education.

(2) Determination of representation.

(a) No later than at the time of referral, the LEA shall determine if the child or youth is:

1. Emancipated and, therefore, represents himself in education decisionmaking; or

2. To be represented by an adult, such as a parent, a guardian, a person acting as a parent, a surrogate parent, or a permanent foster parent.

(b) The LEA shall verify the location, legal status and availability of parents or guardians prior to taking any action with regard to the identification, evaluation or educational placement of a child or youth.

Supreme Court, U.S.
FILED
MAR 28 1998
CLERK

(3)

No. 97-1284

In The

Supreme Court of the United States

October Term, 1997

FAYETTE COUNTY BOARD OF EDUCATION,

Petitioner,

v.

L.G.P., Sr., T.P., L.G.P., Jr.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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5 pp

ARGUMENT

THE ARGUMENTS ADVANCED BY RESPONDENTS DO NOT UNDERMINE THE IMPORTANCE OF REVIEW OF THE IDEA RESIDENCY ISSUE PRESENTED.

The Respondents insist that because the Petitioner School District initially funded the Florida residential placement for three months prior to invoking the residency issue (Appendix B to Petition, Opinion and Order, United States District Court, Eastern District of Kentucky, September 9, 1996, at App. 4) that such represents acquiescence in the Student's claim to residency. This does not serve as an impediment to review. First, the administrative Hearing Officer who first presided over this matter opined that residency is a jurisdictional prerequisite to the duty of a district to provide services to a child (*see* Appendix D to Petition, at App. 34) and the residency issue was submitted as a matter of law on the administrative record below. Moreover, the United States District Court for the Eastern District of Kentucky entered judgment in favor of the School District on the Respondents' counterclaim which asserted, *inter alia,* procedural violations of the IDEA. (*See* Appendix B to Petition, at App. 15 - App. 19.) Respondents are in no position to hold out the manner in which the residency issue was raised by the School District as an obstacle to review.

Respondents' arguments regarding the October 1995 state court judgments of disability and guardianship and the appointment of a representative under state regulations implementing the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.,* are similarly

off the mark. The significance of the disability and guardianship proceedings under KRS Chapter 387 is that the determination of legal disability is a matter to be determined by a jury under that statutory scheme rather than through arguments and counter arguments or in some administrative or quasi administrative setting. Certainly, the School District has no argument with the proposition that the state court determinations of disability and guardianship are critical to a proper consideration of the Student's residency status when the Student was over eighteen (18) years of age and no guardian was present in Kentucky prior to these determinations. The Student's residency was no longer in dispute once the guardianship was obtained. However, Respondents' arguments related to the ultimate determinations of disability and guardianship simply underscore the significance of such determinations and these domestic law rulings in no sense *retroactively* established the Student's Kentucky residency. Neither the administrative tribunal nor the United States District Court had authority to conclude retroactively that the Student was legally disabled in absence of the detailed statutory legal process enacted to prevent him from being unilaterally declared by others to be *legally disabled.*

While Respondents have accurately quoted 707 KAR 1:180 Section 9 dealing with the youth's representation by a parent at all decision making points, such regulation must be read in tandem with 707 KAR 1:180 Section 10 which governs the appointment of a "surrogate parent" in the event no parent can be located. This regulation expressly provides that "the school district shall not assign a surrogate to an emancipated individual."

707 KAR 1:180 Section 10(2). Certainly, the right of the Parents to represent the Student in educational matters in the instant case depended upon the existence of a guardianship and corresponding judicial declaration of disability, *cf.* 707 KAR 1:180 Section 1(2)(a), such that the mere presence of the Parents in Fayette County, Kentucky, did not establish the Student's residency under the IDEA. Moreover, as noted above, the Judgment in the School District's favor on the Respondents' IDEA counterclaim bars Respondents from raising this issue. The matter of the appointment of a representative for the Student simply does not come into play with respect to a student defined as an "emancipated youth" under 707 KAR 1:80 Section 1(2)(a) (*see* Petition, Appendix G). The School District invoked the residency issue in December 1994 when it was made aware that the Parents were not the guardians of a youth who was over eighteen (18) years of age, who had not been determined legally disabled in the context of emancipation and who was living in another state. Other than bearing out the significance of the Student's status as an "emancipated youth," Respondents' argument relating to the appointment of an educational representative is not relevant to the issue of residency litigated below. The matter of an educational representative for the Student is of no moment if it is determined the Student was not a resident entitled to services prior to the judgment of legal disability and guardianship under KRS Chapter 387 in October of 1995. The matter of residency under the IDEA is the issue joined below and Respondents' arguments do not undermine the fundamental importance of that issue.

CONCLUSION

For the reasons stated above and in the Petition, this Court is respectfully requested to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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